U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY D. RANKINS-WALKER and U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA

Docket No. 98-2284; Submitted on the Record;
Issued March 9, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On February 6, 1989 appellant, then a 39-year-old clerk, filed a claim for traumatic injury for back, right arm and shoulder conditions related to an incident on February 3, 1989. The Office accepted appellant's claim for tendinitis of the right shoulder, contusion of the right forearm and lumbosacral strain. On December 12, 1989 the Office authorized right shoulder surgery. On September 25, 1990 appellant returned to work in a limited-duty position, working six hours a day. Appellant filed claims for recurrences of disability beginning December 22 and 27, 1990, September 28, 1991 and September 15, 1992.[1] On March 9, 1995 appellant filed a claim for a schedule award. In a decision dated August 16, 1995, the Office denied appellant's claim for a schedule award on the grounds that the medical report by Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon and Office referral physician, constituted the weight of the medical evidence and revealed no permanent partial impairment. By decision dated August 7, 1996, the Office terminated appellant's compensation benefits on the grounds that she had no residual disability from her accepted February 1989 employment injury. Thereafter, in a decision dated January 10, 1997, the Office denied appellant's request for reconsideration on the grounds that it was not sufficient to establish a basis for reopening the record. By decision dated

[1] The Office found that appellant's September 28, 1991 recurrence of disability claim was a new injury which it accepted for a transient episode of claustrophobia.

June 3, 1998, the Office found that appellant's March 8, 1998 request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.[2]

Under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[4] which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[5] In *Leon D. Faidley, Jr.*[6] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[7]

Appellant's request for reconsideration dated March 8, 1998 was received March 16, 1998. The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, August 7, 1996. Since appellant filed her request for reconsideration more than a year from the Office's August 7, 1996 merit decision, the Board finds that the Office properly determined that said request was untimely.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must

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[2] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on July 9, 1998, the only decision before the Board is the Office's June 3, 1998 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b).

[5] 20 C.F.R. § 10.138(b)(2).

[6] 41 ECAB 104 (1989).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is not of sufficient probative value to create a conflict in medical opinion or establish clear procedural error. Thus, this evidence is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.[14] The Board notes that the issue in this case is medical in nature and that the only medical evidence submitted by appellant with her March 8, 1998 reconsideration request was Dr. William L. Chollak's January 5, 1998 report. Dr. Chollak, a Board-certified orthopedic surgeon and appellant's treating physician, diagnosed persistent tendinitis and noted appellant's prior rotator cuff surgery in January 1990. He discussed appellant's medical course of treatment and indicated that appellant should not do repetitive quick movements, overhead activities or lifting with her right arm. Dr. Chollak reported that appellant had further surgical options and indicated that appellant's right arm would never be normal. The report by Dr. Chollak is not sufficiently reasoned or rationalized to establish clear evidence of error in the Office's determination that appellant's February 1989 disability had ceased. Nor is the report of sufficient probative value to create a conflict in the medical evidence with the well-reasoned and rationalized report by Dr. Horowitz which constituted the weight of the medical evidence. Dr. Chollak's report does not raise a substantial question concerning the correctness of the Office's decision. As appellant failed to submit clear evidence of error, the Office did not abuse its discretion in denying review of the case.

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[8] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) which states: "the term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake."

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *Leona N. Travis*, 43 ECAB 227 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[12] *See Leona N. Travis, supra* note 10.

[13] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[14] *Leon D. Faidley, Jr., supra* note 6.

The decision of the Office of Workers' Compensation Programs dated June 3, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 9, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member